(1)

No. 01-

011819 JUN 11 2002

IN THE

Supreme Court of the United States

RICK SALGADO, *et al.*,
Petitioners,

v.

MIGUEL ROSALES, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL P. STRUCK *
JONES, SKELTON & HOCHULI
2901 N. Central Avenue
Phoenix, Arizona 85012
(602) 263-1700

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

33 pg

QUESTION PRESENTED

Could reasonable officers disagree, under *Saucier v. Katz*, 533 U.S. 194 (2001), on the legality of using deadly force against an armed suspect—fleeing the scene of a gang-related, drive-by shooting—who never takes aim at the officers but poses a general threat to the community if allowed to escape?

LIST OF PARTIES

Petitioners Rick Salgado and Jose Lopez are police officers employed by the City of Phoenix. Together with their employer, the officers were named as defendants in a civil rights action (the City has since been dismissed and is not a party to this Petition).

Respondent Miguel Rosales is the plaintiff in the action below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	3
CONCLUSION	12
APPENDICES	1a

TABLE OF AUTHORITIES

CASES	Page
Alexander v. City and County of San Francisco, 29 F.3d 1355 n. 13 (9th Cir. 1994)	6
Anderson v. Creighton, 483 U.S. 635 (1987)	8
Brower v. County of Inyo, 884 F.2d 1316 (9th Cir. 1989)	6
Curnow v. Ridgecrest Police Department, 952 F.2d 321 (9th Cir. 1991)	5
Crawford-El v. Britton, 523 U.S. 574 (1998)	8
Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001)	6
Ford v. Childers, 855 F.2d 1271 (7th Cir. 1988)	5
Forrett v. Richardson, 112 F.3d 416 (9th Cir. 1997)	5, 6
Graham v. Connor, 490 U.S. 386 (1989)	5, 6, 8, 9, 10
Hunter v. Bryant, 502 U.S. 224 (1991)	10, 11
Illinois v. Lafayette, 462 U.S. 640 (1983)	6
Krueger v. Fuhr, 991 F.2d 435 (8th Cir. 1993), *cert. denied*, 510 U.S. 946 (1993)	5
Malley v. Briggs, 475 U.S. 335 (1986)	10, 11
Mitchell v. Forsyth, 472 U.S. 511 (1985)	2
Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994) *cert. denied*, 115 S.Ct. 81 (1994)	6
Saucier v. Katz, 553 U.S. 194 (2001)	*passim*
Snyder v. Trepagnier, 119 S.Ct. 868 (1999)	7
Tennessee v. Garner, 471 U.S. 1 (1985)	5, 6, 7, 11
United States v. Martinez-Fuerte, 428 U.S. 543 n. 12 (1976)	6
United States v. Robinson, 414 U.S. 218 (1973)	9
Whren v. United States, 517 U.S. 806 (1996)	8

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	2
28 U.S.C. § 1343(3)	2
42 U.S.C. § 1983	2
U.S. Constitution, Fourth Amendment	2

IN THE

Supreme Court of the United States

No. 01-___

RICK SALGADO, *et al.*,
Petitioners,

v.

MIGUEL ROSALES, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners Salgado and Lopez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals denying rehearing on March 13, 2002 is contained under Appendix A. The memorandum decision of the court of appeals is unreported at Appendix B. The District Court's September 9, 1999 order granting in part and denying in part summary judgment is included in Appendix C.

JURISDICTION

The court of appeals rendered its judgment on December 26, 2001, followed by an order denying a petition for rehearing and suggestion for rehearing *en banc* on March 13, 2002 (Appendix A). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment states in pertinent part as follows:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated. . . .

STATEMENT OF THE CASE

This is a civil rights action arising from the use of deadly force by Officers Salgado and Lopez against Respondent Rosales on June 19, 1993 in Phoenix, Arizona. The 42 U.S.C. § 1983 complaint alleged, *inter alia*, that these two officers violated Rosales' Fourth Amendment right to be free from unreasonable force. The District Court for the District of Arizona had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3).

Following briefing on a motion for summary judgment filed by the officers, the District Court entered an order granting in part and denying in part the motion. Specifically, the District Court denied that portion of Petitioners' motion seeking qualified immunity on the excessive force claim. Petitioners appealed the denial of qualified immunity to the Ninth Circuit under *Mitchell v. Forsyth*, 472 U.S. 511 (1985), contending that the District had erroneously merged the Fourth Amendment liability standard with the related but distinct qualified immunity analysis and mistakenly concluded that "a jury could certainly find that the officers' use of deadly force was not reasonable." Pet. App. C at 11a.

The Ninth Circuit initially stayed any ruling on the appeal pending the outcome of this Court's anticipated decision in *Saucier v. Katz*, 553 U.S. 194 (2001). Once the stay was lifted following *Katz*, however, the Ninth Circuit issued an abbreviated memorandum decision affirming the denial of qualified immunity. While purporting to apply the two-pronged qualified immunity analysis reaffirmed in *Katz*, the Ninth Circuit initially reasoned that a Fourth Amendment violation occurred when Salgado and Lopez shot Rosales in the back:

> Under the facts as developed at this stage, Officers Salgado and Lopez used unjustifiable force when they shot Rosales in the back. By their own admission, the officers did not consider Rosales a fleeing felon as he approached them. And, for purposes of this appeal, they concede that Rosales never turned and aimed his gun at them once he passed their position. Nor did they offer any evidence that they believed Rosales posed a significant threat or specified threat to others.

Pet. App. B at 3a. In professed allegiance to *Katz*, the Ninth Circuit then undertook a second question which it framed as follows: "whether, in using excessive force, Salgado and Lopez were reasonably mistaken as to the legal constraints on their use of deadly force." The panel immediately answered this question in the negative by referencing its earlier analysis of the Fourth Amendment issue: "Again, the officers' own statements belie any reasonableness in their mistaken belief that shooting Rosales in the back was justified." *Id.* at 4a. The Ninth Circuit denied the subsequent petition for rehearing. Pet. App. A.

REASONS FOR GRANTING THE PETITION

While Petitioners have conceded for purposes of determining the qualified immunity issue that Rosales (the suspect/plaintiff) made no movement or turn toward the

officers while he ran from the drive-by shooting scene,[1] several other factual concessions are critically important and were omitted from the Ninth Circuit's decision:

- While working off-duty as security guards at a restaurant in a dangerous part of east Phoenix, (where drive-by shootings and gang incidents were common), the two officers personally heard and observed 5-6 gunshots, at midnight, from a nearby gun battle seconds earlier;
- The officers saw Rosales and two companions running from the gun scene in the officers' direction;
- Rosales, in apparent pursuit of another, was carrying a gun;
- Rosales conceded hearing the verbal warning: "STOP—PHOENIX POLICE!" before he was shot;
- Rosales conceded that he had no intention of stopping when he heard the police command, due to the fact he was violating his parole by being in possession of the gun;
- Rosales' two unarmed companions immediately dropped to the ground while Rosales continued to run;
- Rosales testified that he was shot by police in the back and side as he continued to run past them, having never pointed his gun at them.

Under the Ninth Circuit's analysis, these facts gave the officers no right to use deadly force and, moreover, no entitlement to qualified immunity from personal liability. While

---

[1] The officers testified in their depositions that Rosales turned toward them while running past them, with the gun in his hand and his arm extended. To avoid a summary judgment dispute, however, the officers have accepted as true Rosales' deposition testimony that he never pointed his gun toward the officers during his flight from the gunfight.

disadvantaged in their efforts to scrutinize the Ninth Circuit's decision based on its brevity, Petitioners submit the following bases in support of the Petition:

1. *Katz* applies to *all* Fourth Amendment cases, including those involving deadly force. The doctrine of qualified immunity does not merely protect police who *arrest* or unnecessarily injure seemingly guilty (but perhaps innocent) people who pose a threat to high-level executives; it protects police who *shoot* seemingly dangerous (but perhaps harmless) people who pose a threat to police or the community they serve. This case represents the latest among Ninth Circuit decisions in which this principle has been ignored or avoided, while other circuits appear to have no difficulty relieving police officers of personal liability when they fire their weapons at suspects. *Compare Curnow v Ridgecrest Police Department*, 952 F.2d 321 (9th Cir. 1991) (officers not entitled to immunity because suspect "did not the point the gun at the officers and apparently was not facing them when they shot him") [2]; with *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988) (officer constitutionally justified in shooting bank robbery suspect in the back based on circumstances confronting officer); and *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir. 1993), *cert. denied*, 510 U.S. 946 (1993) (shooting suspect in the back constitutional where officer in foot pursuit saw suspect reach toward his right hip to pull knife, observing: "it is not remarkable that an escaping felony suspect would be shot in the back.").

---

[2] The only published Ninth Circuit decision finding police constitutionally justified in shooting a suspect in the back is *Forrett v. Richardson*, 112 F.3d 416 (9th Cir. 1997). It involved a violent suspect's hour-long flight from a residential burglary in which he had shot two victims. In concluding that police were justified in shooting the unarmed suspect in the back as he ignored officer commands to surrender and began climbing over a fence, the Ninth Circuit stated: "Under [the *Garner*] test, it is not necessary that the suspect be armed or threaten the officer with a weapon." 112 F.3d at 420.

Fourth Amendment analysis of deadly force cases has proven difficult for some Ninth Circuit panels, who continue to mistakenly assume that police must show the exhaustion (or careful consideration) of less intrusive alternatives before resorting to deadly force. *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989) were designed to put this false notion to rest,[3] yet Ninth Circuit cases decided since these include similarly restrictive language reprimanding police when they fail to explore alternatives less intrusive than deadly force. *See generally Deorle v. Rutherford*, 272 F.3d 1272, 1282 (9th Cir. 2001) ("Nothing in the record before us suggests that [the officer] considered other, less dangerous, methods of stopping [the suspect]."); *Forrett*, 112 F.3d at 420 ("The alternative must be reasonably likely to lead to apprehension before the suspect can cause further harm."); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 n.13 (9th Cir. 1994) ("we need not, and do not, express any opinion on the validity of [the] argument" that the deadly force used by the officers was unreasonable because the officers failed to exhaust less intrusive alternatives.") and *Brower v County of Inyo*, 884 F.2d 1316, 1318 (9th Cir. 1989) ("Did a reasonable, non-deadly alternative exist for apprehending the suspect.").[4] This disparate treatment of deadly force cases from all other Fourth Amendment issues (searches and arrests) helps

---

[3] *See also Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (proper Fourth Amendment inquiry is whether officers acted reasonably, not whether they had less intrusive alternatives available to them); and *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976) ("The logic of such elaborate less—restrictive—alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure posers").

[4] Other circuits do not appear to struggle in following this Court's pronouncements on the subject. *See Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 81 (1994) (the Constitution does not require "law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used.")

explain why application of the qualified immunity doctrine to deadly force actions continues to be wildly inconsistent within and without the Ninth Circuit. And if a judge believes that deadly force is unjustified because of less intrusive alternatives available to the officer, how likely is it that such officer will succeed in convincing the same judge to grant him immunity nonetheless based on non-obvious nature of his constitutional mistake?

Garner's deadly force test [5] does not displace the qualified immunity analysis which must occur under *Katz*.[6] The qualified immunity evaluation under *Katz* (no liability if "a reasonable officer . . . could have believed that [the use of force] was within the bounds of appropriate police responses") is no different in a case involving deadly force than it is in a lawsuit seeking damages for overly tight handcuffs. By deciding the *Garner* question adversely to police, a court does not then become bound to also decide the qualified immunity against the officer. Yet this is precisely what the Ninth Circuit panel did below—holding that the "unreasonableness" of the officers' belief that the shooting

---

[5] Under *Garner*, an officer's use of deadly force is reasonable if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." 471 U.S. at 3.

[6] An analogous case involving a similar immunity issue was almost considered by this Court in *Snyder v. Trepagnier*, 525 U.S. 1098 (1999) (certiorari granted), 526 U.S. 1083 (2000) (writ dismissed pursuant to Rule 46). *Snyder* involved an officer's shooting of a felony suspect in the back as he ran from the officer through a muddy swamp, following a high-speed chase. *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998). It is unfortunate that the distinction between qualified immunity and Fourth Amendment liability in excessive force cases was drawn in *Katz* (involving the arrest/detention of a heckler at a speech given by then-vice president Gore) instead of *Snyder* (a deadly force case), for it would have laid to rest the notion that *Garner* cases should be treated differently under qualified immunity.

was constitutionally justified similarly compelled the denial of qualified immunity. Granting the Petition is necessary to settle this issue and resolve the conflict.

2. An officer's subjective beliefs concerning the danger he and others face is largely irrelevant when evaluating his entitlement to qualified immunity. This is a longstanding Fourth Amendment principle—the role of objectivity in assessing an officer's actions—yet the Ninth Circuit chose to poison its analysis by relying exclusively on the officers' subjective assessment of danger in ruling against them.

Whether the question is one involving qualified immunity or Fourth Amendment analysis, this Court has repeatedly emphasized that the governmental actor's subjective motivation or intent is irrelevant. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (qualified immunity depends on "the objective [albeit fact-specific] question whether a reasonable officer would have believed [the relevant conduct] to be lawful."); *Graham*, 490 U.S. at 397 ("the question in police brutality cases is 'whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their intent or motivation"); *Crawford-El v. Britton*, 523 U.S. 574 (1998) ("Evidence concerning the defendant's subjective intent is simply irrelevant to [the qualified immunity] defense."); and *Whren v. United States*, 517 U.S. 806 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Despite this well known body of precedent, the Ninth Circuit seized upon deposition testimony of the officers which stated that *they* personally did not consider Rosales to be a "fleeing felon" as he raced past them—from the drive-by shooting scene—with gun in hand. This testimony[7] does

---

[7] One logical explanation for the officers' unwillingness to classify Rosales as a fleeing felon was the fact that the officers had already

nothing to undermine their entitlement to qualified immunity. If a risk of danger would be apparent to the "reasonable police officer" examining the facts, it is quite irrelevant that the officer involved in the shooting subjectively discounts such risk.[8] *See United States v. Robinson*, 414 U.S. 218, 236 (1973) ("[I]t is of no moment that [the officer] did not indicate any subjective fear of the [arrestee] or that he did not himself suspect that [the arrestee] was armed.").

By relying exclusively on the officers' testimony that they did not consider Rosales to be a fleeing felon the Ninth Circuit disregarded established precedent. An objectively reasonable officer could certainly conclude that Rosales posed a threat without the officers themselves "offer[ing] any evidence that they believed Rosales posed a significant or specified threat to others." Pet. App. B at 3a. Petitioners urge the Court to either grant certiorari on this basis or, alternatively, remand this matter to the Ninth Circuit for reconsideration in light of the objective test required by *Graham* and *Katz*.

3. Judges should not classify constitutional mistakes as reasonable or unreasonable but must ask the question: "*Could*

---

testified to their personal reasons for shooting him—he pointed the gun at them during his flight. Everyone acknowledges that Petitioners would be justified in shooting Rosales had he turned toward them with gun in hand, yet Petitioners did not appreciate the impact their answers to hypothetical questions would have (but should not have) on appellate judges applying summary judgment standards to the evidence.

[8] Suppose a foolishly brave officer does not consider himself in danger when surrounded by knife-wielding gang members, testifies accordingly, yet somehow fights his way free. No one can seriously suggest that his foolish assessment of the dangerous circumstances will overcome his entitlement to qualified immunity. The same goes for an officer staring down the barrel of a rifle—if he subjectively thinks the gun unloaded and is simply a scare tactic, his subjective (and naive) belief will not prevent him from escaping liability if he should shoot the suspect for reasons unrelated to the danger he faced.

a reasonable officer believe the stipulated conduct was constitutionally acceptable?" Only by applying the hypothetical judgment of reasonable officers—not their own personal views of what is reasonable—will judges be true to this Court's well established precedent. *See Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (qualified immunity inquiry is whether "a reasonable officer could have believed that probable cause existed to arrest" the suspect, not whether "another reason-able, or more reasonable, interpretation of the events can be constructed five years after the fact."); and *Graham*, 490 U.S. at 396-97 (whether force used is objectively reasonable is judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.").

The subtle distinction between what a reasonable jury *could find* and what a reasonable officer *could believe* escaped both the District Court and Ninth Circuit in this case.[9] Yet the viewpoint from which the qualified immunity question is asked illustrates the difference between a single level of objective reasonableness (the substantive Fourth Amendment standard) and a more forgiving standard that leaves room for mistaken judgments and reasonable disagreements among police officers (the qualified immunity test). *See Hunter*, 502 U.S. at 228; and *Malley v. Briggs*, 475 U.S. 335 (1986). In essence, a judge's analysis of qualified immunity mirrors, with one important difference, the summary judgment standard used in routine negligence cases: While a judge reviewing the evidence on an ordinary Rule 56 motion asks whether a reasonable jury could find in favor of the non-movant—and if so, summary judgment must be

---

[9] The District Court below denied qualified immunity based on its view that "a jury could certainly find that the officers' use of deadly force was not reasonable." Pet. App. C at 11a. The Ninth Circuit's decision, while reciting *Katz*, was no less erroneous in stating that: "the officers' own statements belie any reasonableness in their mistaken belief that shooting Rosales in the back was justified." Pet. App. B at 4a.

denied—a judge deciding a qualified immunity motion asks whether a reasonable officer "could believe" the conduct lawful and, if so, the motion must be *granted*. *Malley*, 475 U.S. at 341 ([I]f officers of reasonable competence could disagree on this issue, immunity should be recognized.").

Only by concluding that reasonable officers would universally condemn this police shooting can personal liability be imposed on Petitioners. Yet the Ninth Circuit refused to examine this case from the viewpoint(s) of reasonable officers on the scene and instead substituted its own judgment as to what the exigencies of the moment required or allowed. Had the Ninth Circuit correctly applied Supreme Court precedent from *Katz*, *Hunter*, and *Malley*, it would have been impossible for the panel to reach the conclusion it implicitly reached: that no reasonable officer in the world could believe Petitioners' use of deadly force against the armed, fleeing Rosales was constitutionally lawful. Such a result mocks qualified immunity analysis and is probably even incorrect from a substantive Fourth Amendment view. *See Garner*, 471 U.S. at 21 ("Although *the armed burglar would present a different situation*, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous.") (emphasis added).

Garner does not demand that police shoot only those criminal suspects whose guns are loaded, pointed, and cocked at police; there exist other factual situations, including the apprehension of felony suspects fleeing the scene of a drive-by shooting, which are unsettled enough to an officer that his decision to employ deadly force should not be subjected to civil rights liability simply because his view of Fourth Amendment boundaries turned out to be inaccurate. Certiorari is needed to bring the Ninth Circuit into conformity with established precedent.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DANIEL P. STRUCK *
JONES, SKELTON & HOCHULI
2901 N. Central Avenue
Phoenix, Arizona 85012
(602) 263-1700

Attorneys for Petitioners

* Counsel of Record

June 11, 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 99-17204
D.C. No. CV-95-01225-DAE
District of Arizona, Phoenix

MIGUEL ROSALES,
Plaintiff-Appellee,

v.

CITY OF PHOENIX, a municipal corporation,
Defendant,

and

RICK SALGADO, husband; MARY ELLEN SALGADO, wife;
JOSE LEON LOPEZ, husband; DEBBIE LOPEZ, wife,
Defendants-Appellants.

ORDER

Before: HAWKINS, MCKEOWN and WARDLAW, *Circuit Judges.*

The panel has voted to deny the petition for rehearing and to deny the petition for rehearing *en banc*, filed January 22, 2002.

The full court has been advised of the petition for *en banc* rehearing, and no judge of the court has requested a vote on the petition for rehearing *en banc*. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing *en banc* are DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 99-17204
D.C. No. CV-95-01225-DAE

MIGUEL ROSALES,
Plaintiff-Appellee,

v.

CITY OF PHOENIX, a municipal corporation,
Defendant,

and

RICK SALGADO, husband; MARY ELLEN SALGADO, wife;
JOSE LEON LOPEZ, husband; DEBBIE LOPEZ, wife,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Arizona
David A. Ezra, District Judge, Presiding
Submitted March 13, 2001 [1]
San Francisco, California

MEMORANDUM [2]

Before: HAWKINS, McKEOWN, and WARDLAW, *Circuit Judges*.

---

[1] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[2] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth circuit Rule 36-3.

City of Phoenix Police Officers Rick Salgado and Jose Lopez appeal the district Court's order denying their motion for summary judgment in Miguel Rosales' action against them under 42 U.S.C. § 1983. We affirm.

We evaluate a defense of qualified immunity in excessive force claims under the two-step framework established in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001). As a threshold matter, we must determine whether Rosales has demonstrated the deprivation of a constitutional right. *Id.* at 2156. If so, we then determine whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* Because we perform this analysis at the summary judgment stage, we must view the evidence in the light most favorable to Rosales. *Id.*

I. Constitutional Right

Under the Fourth Amendment, officers may only use a degree of force that is "objectively reasonable" under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). The use of deadly force is only reasonable when used to prevent the escape of a fleeing felony suspect if "it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). Under the facts as developed at this stage, Officers Salgado and Lopez used unjustifiable force when they shot Rosales in the back. By their own admission, the officers did not consider Rosales a fleeing felon as he approached them. And, for purposes of this appeal, they concede that Rosales never turned and aimed his gun at them once he passed by their position. Nor did they offer any evidence that they believed Rosales posed a significant or specified threat to others. *See Deorle v. Rutherford*, 2000 WL 33644487 at (9th Cir. Nov 19, 2001) ("A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone,

justifies the use of force that may cause serious injury. There must be other significant circumstances that warrant the use of such a degree of force at the time it is used."). Thus, we find that Rosales has demonstrated a deprivation of his Fourth Amendment right to be free from unjustified deadly force.

II. Reasonableness

We must still ask whether, in using excessive force, Salgado and Lopez were reasonably mistaken as to the legal constraints on their use of deadly force. *See Katz*, 121 S.Ct. at 2158 ("If the officer's mistake as to what the law requires is reasonable . . . the officer is entitled to the immunity defense."). Again, the officers' own statements believe any reasonableness in their mistaken belief that shooting Rosales in the back was justified. Thus, we affirm the district court's denial of summary judgment and remand for further proceedings.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CV. NO.95-1225 PHX.SMM (DAE)

MIGUEL ROSALES,

Plaintiff,

v.

CITY OF PHOENIX, a municipal corporation, RICK SALGADO, and Mrs. RICK SALGADO, husband; and wife and JOSE LEON LOPEZ, and MRS. JOSE LEON LOPEZ, husband and wife,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Court heard Defendants' Motion for Summary Judgment on August 18, 1999: Joe Keilp, Esq., and Patricia A. Gitre, Esq., appeared at the hearing on behalf of Plaintiff; Lori A. Metcalf, Esq., and Daniel P. Struck, Esq., appeared at the hearing on behalf of Defendants. After reviewing the motion and the supporting and opposing memoranda, the court GRANTS IN PART and DENIES IN PART Defendants' Motion for Summary Judgment.

BACKGROUND

This case arises from a shooting by off-duty police officers. On the evening of June 19, 1993, Defendants Rick Salgado and Leon Lopez, full-time officers with the Phoenix Police Department, were working off-duty as security guards for the Tacos Del Campos Restaurant on the corner of Van Buren

and 22nd Streets. While standing outside the restaurant sometime after midnight, the officers heard gunshots. The officers then saw several people, including Plaintiff Miguel Rosales ("Plaintiff"), running through an open field towards the restaurant. The officers observed Plaintiff carrying a gun. Both officers drew their guns and took cover behind the corner of the restaurant.

At this point, the parties' versions of the facts diverge. The officers claim that when Plaintiff ran past them, Officer Lopez yelled, "Stop, Police. Police." The officers allege that Plaintiff then turned and pointed his gun at Officer Lopez. Officer Lopez took cover behind a parked vehicle while Officer Salgado fired his gun at Plaintiff. Officer Lopez then came from behind the vehicle and fired at Plaintiff. The two officers fired at least eight rounds at Plaintiff.

In contrast to the officers' allegations, Plaintiff insists that he never pointed his gun at the officers. Instead, he contends that he continued running away from the officers after he heard them yell. Both parties agree that Plaintiff was shot three times. One bullet struck Plaintiff in the right elbow, traveled down his right arm and lodged in his wrist toward the thumb area. The second bullet struck Plaintiff's right knee, lodging underneath the right kneecap. The third bullet struck Plaintiff in the lower left abdominal area. Plaintiff's expert testified in his deposition that this bullet entered in the area of the kidney and exited through the front. Plaintiff's expert further stated that the forensic evidence regarding Plaintiff's wounds show that Plaintiff was shot when his back was to the officers. Plaintiff survived the shooting.

After he recovered, Plaintiff was arrested and charged with aggravated assault for having allegedly pointed his gun at Officer Lopez. A jury acquitted Plaintiff of the aggravated assault charge, but found him guilty of disorderly conduct.

On June 19, 1995, Plaintiff filed a complaint against the officers and the City of Phoenix, alleging civil rights violations under 42. U.S.C. § 1983, in violation of the Fourth and Fourteenth Amendments to the United States Constitution. Liability against the officers is premised on use of excessive force, while liability against the City of Phoenix is based on a policy or practice of excessive force, inadequate investigation of violent incidents, failure to discipline police officers, and/or concealment of violent incidents. Plaintiff subsequently amended his complaint on September 12, 1995.

On October 28, 1997, Defendants filed a Motion for Summary Judgment. The court held a hearing on August 13, 1998, at which time the court granted Plaintiff's request, pursuant to Federal Rule of Civil Procedure 56(f), for additional time to respond to Defendants' motion. Plaintiff has now filed a second motion under Rule 56(f) to continue the hearing on Defendants' summary judgment motion. Because Plaintiff's Rule 56(f) request relates solely to the *Monell* claim against the City of Phoenix, the court will proceed to address the remaining issues raised in Defendants' Motion for Summary Judgment.

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. *Brinson v. Linda rose Joint Venture*, 53 F.3d 1044, 1050 (9th Cir. 1995). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the

differing versions of the truth. *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982). The substantive law defines which facts are material. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A genuine issue of material fact requires more than some "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Only disputes over outcome determinative facts under the applicable substantive law will preclude the entry of summary judgment. *Id.* If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *Metro Indus. Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir.), *cert. denied*, 519 U.S. 868 (1996). Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Liberty Lobby*, 477 U.S. at 250. In meeting this burden, parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *Keenan v. Allan*, 91 F.3d 1275, 1278 (9th Cir. 1996).

The Supreme Court cases cited above establish that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

DISCUSSION

Defendants raise four arguments in support of their motion for summary judgment: 1) Plaintiff's claim that false criminal charges were filed against him is premature; 2) no constitutional violation occurred; 3) Officers Lopez and Salgado are entitled to qualified immunity; and 4) the City of Phoenix cannot be liable under the facts of the case. As noted above, the court will reserve ruling on the fourth argument until the Rule 56(f) motion is resolved. The court addresses the remaining three arguments in turn.

I. *False Charges/Arrest/Imprisonment*

In Paragraph 12 of his Amended Complaint, Plaintiff alleges that Officers Salgado and Lopez ("the Officers") filed false criminal charges against him, resulting in his imprisonment. Defendants claim this allegation is premature because Plaintiff was convicted of disorderly conduct as a result of the charges filed against him and that conviction has not been invalidated.

Although it is unclear whether Plaintiff's allegations are more akin to those for false arrest or for false imprisonment,[1] his claims are barred under either theory by the United States Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), and subsequent Ninth Circuit decisions. *Heck* precludes a § 1983 claim based on actions which would "render a conviction or sentence invalid" where that conviction has not been reversed, expunged or called into question by issuance of a writ of habeas corpus. *Heck*, 512 U.S. at 486-87. "*Heck*, in other words, says that if a criminal conviction arising out of the same facts stands and is

---

[1] In his amended complaint, Plaintiff alleges that the Officers "caused false criminal charges to be filed against Plaintiff, resulting in Plaintiff's imprisonment." In response to Defendants' Motion for Summary Judgment, Plaintiff asserts that "he was unlawfully arrested and detained."

fundamentally inconsistent with the unlawful behavior for which § 1983 damages are sought, the 1983 action must be dismissed."

To prevail on his § 1983 claim for false arrest and imprisonment, Plaintiff would have to demonstrate that there was no probable cause to arrest him. *See Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998). Plaintiff's conviction for disorderly conduct necessarily implies the existence of probable cause. Because the existence of probable cause is "fundamentally inconsistent" with Plaintiff's false arrest claim, this portion of his § 1983 action is barred. The fact that Plaintiff was acquitted of the aggravated assault charge does not alter this conclusion. *Baker v. McCollan*, 443 U.S. 137, 145 (1979) ("The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released."). Thus, the court concludes that Defendants are entitled to summary judgment on Plaintiff's false arrest and false imprisonment claims.

II. *Excessive Force*

The first step in any action under 42 U.S.C. § 1983 is to identify the constitutional right allegedly violated. *Graham v. Connor*, 490 U.S. 386, 394 (1989). The United States Supreme Court has held that all excessive force claims against law enforcement officials in the course of an arrest, investigatory stop or other "seizure" of a person should be analyzed under the Fourth Amendment. *Id.* The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision or hindsight. *Id.* at 396. "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

If, as Plaintiff contends, he did not point a gun at the officers, but was instead running away at the time he was shot, a jury could certainly find that the officers' use of deadly force was not reasonable. Nonetheless, Defendants argue that Plaintiff's version of the events does not defeat summary judgment because "no reasonable jury would believe Plaintiff's version of the events." In making this argument, Defendants (1) impermissibly ask the court to make credibility determinations, and (2) ignore the evidence presented by Plaintiff's forensics expert.

Defendants also argue that even if Plaintiff did not point his gun at the officers, their use of deadly force was still reasonable, given that the shooting occurred at nighttime in a bad neighborhood where gunfire had earlier erupted. While these "facts and circumstances" must be considered in determining whether the officers' response was reasonable, they do not, as a matter of law, compel such a finding. The Ninth Circuit has held repeatedly that the reasonableness of force used is ordinarily a question of fact for the jury. *See, e.g., Liston v. County of Riverside*, 120 F.3d 965, 976 n. 10, 977 (9th Cir. 1997) ("It is for the finder of fact to determine the reasonableness of the force used in this case, and that can be done only upon a fully developed record."); *see also Alexander v. County of Los Angeles*, 54 F.3d 1315, 1322 (9th Cir. 1995); *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994).

Because the court concludes that a genuine issue of material fact exists as to whether Plaintiff pointed his gun at the officers, the court is unable to conclude, as a matter of law, that the officers' use of deadly force was reasonable. Accordingly, Defendants' motion for summary judgment on the excessive force claim is DENIED.

III. *Qualified Immunity.*

"Officers are entitled to qualified immunity even if they acted unconstitutionally, as long as a reasonable officer could have believed the conduct lawful." *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1322 (9th Cir. 1995). In the context of an excessive force claim, defendants can win on summary judgment if the court, after resolving all facts in favor of the plaintiff, concludes that a reasonable officer could have believed his use of force was reasonable. Because in excessive force cases the issue is whether the officer acted reasonably, the qualified immunity inquiry and the inquiry on the merits are the same. *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994).

As discussed above, viewing, as the court must, the evidence in the light most favorable to Plaintiff, a jury could find that a reasonable officer would have known that the use of deadly force violated Plaintiff's clearly established Fourth Amendment right to be free from excessive force. *See Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985) (holding that police use of excessive force is an established constitutional violation). Defendants argue that the officers fired "to prevent Plaintiff from killing or harming Officer Lopez, not simply to prevent Plaintiff's escape." This argument ignores the fact that these material facts are disputed.

Defendants also argue that the Ninth Circuit's decision in *Forrest v. Richardson*, 112 F.3d 416, 419 (9th Cir. 1997), compels the conclusion that the officers' use of deadly force was objectively reasonable. In *Forrest*, police officers in Riverside, California shot at the Plaintiff, who was suspected of committing a violent home invasion several hours earlier, as he attempted to escape. The Ninth Circuit held that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to

prevent escape, and if, where feasible, some warning has been given." The facts in *Forrest* were far more egregious than those here: the suspect had violently entered the victims' home; tied up the three occupants, shot one at point blank range, shot at another, and then escaped, taking with him several firearms and several rounds of ammunition. *Id.* at 418. One of the victims provided eyewitness testimony to the police, linking the suspect to the crime. In light of these facts, and the fact that the suspect "used every desperate means at his disposal to elude capture for almost an hour of hot pursuit," the court held that it was objectively reasonable for the police officers to have used deadly force. *Id.* at 421.

The facts in this case do not, as a matter of law, demonstrate either that Plaintiff threatened the officers with his weapon or that there was probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm. At most, the facts show that prior to shooting Plaintiff, the officers heard gunfire and later saw several people, including Plaintiff, running across an open field. These facts do not necessarily establish the existence of probable cause to believe Plaintiff had just committed a crime, let alone inflicted or threatened serious bodily injury. Plaintiff may have displayed his weapon in self-defense or been running from an assault. Therefore, the *Forrest* case does not lead to the conclusion that the officers' use of deadly force was objectively reasonable.

Thus, the court cannot conclude, as a matter of law, that a reasonable officer would have believed that the use of deadly force under these facts and circumstances was lawful. Accordingly, the qualified immunity portion of Defendants' summary judgment motion is DENIED.

CONCLUSION

For the reasons stated above, the court GRANTS IN PART and DENIES IN PART Defendants' Motion for Summary Judgment. Defendants are entitled to summary judgment on Plaintiff's false charges/false arrest/false imprisonment claim. However, because genuine issues of material fact exist as to whether Plaintiff pointed his gun at the officers and whether the officers' use of deadly force was reasonable, Defendants are not entitled to summary judgment on either Plaintiff's excessive force claim or the issue of qualified immunity.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii: _____

_____

DAVID ALAN EZRA
CHIEF UNITED STATES DISTRICT JUDGE

Miguel Rosales v. City of Phoenix, et al., Civil No. 95-1225 PHX-SMM (DAE); ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Supreme Court, U.S.
FILED
AUG 12 2002
OFFICE OF THE CLERK

(2)

No. 01-1819

In The
Supreme Court of the United States

RICK SALGADO, *et al.*,

Petitioners,

v.

MIGUEL ROSALES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JOE KEILP*
JOE KEILP, P.C.
1440 East Washington #100
Phoenix, Arizona 85034
(602) 252-0100

PATRICIA A. GITRE
111 West Monroe #1650
Phoenix, Arizona 85003
(602) 254-8333

Attorneys for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Are police officers entitled to qualified immunity when they ambush, without effective warning, a man running down a street with a gun from an area where several shots were fired?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
I. THE COURT CORRECTLY APPLIED THE *GRAHAM/GARNER* DEADLY FORCE TEST TO THE FACTS OF THIS CASE	4
II. THE NINTH CIRCUIT CORRECTLY APPLIED THE SECOND PRONG OF *SAUCIER*	7
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Allen v. City of Portland, 73 F.3d 232 (9th Cir. 1995) 5

Anderson v. Creighton, 483 U.S. 635 (1987) 7, 8

Beck v. State of Ohio, 379 U.S. 89 (1964) 5

Clem v. Corbeau, 284 F.3d 543 (4th Cir. 2002) 8

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) 5

Graham v. Connor, 490 U.S. 386 (1989) 4, 9

Saucier v. Katz, 553 U.S. 194 (2001) 4, 7, 8, 9

Tennessee v. Garner, 471 U.S. 1 (1985) 3, 5

Wong Sun v. United States, 371 U.S. 471 (1963) 5

STATEMENT OF THE CASE

Respondent accepts Petitioners' statement of the procedural posture of the case, but rejects their characterizations of the decision of the Ninth Circuit Court of Appeals.

Factual Background

The facts, viewed in the light most favorable to the Respondent, the non-moving party below, are:

Petitioners, two off-duty Phoenix Police Officers, while working as private security guards at night in a restaurant parking lot in a high-crime area, heard a series of gunshots coming from an area about a block away. Shortly thereafter, they observed Respondent running in their direction at a jogging pace across a vacant lot. As Respondent stopped and waited for traffic to clear a street he had to cross, Petitioners decided, for tactical advantage, to conceal themselves behind parked cars and wait until Respondent had gone slightly past them before initiating a confrontation. As Respondent ran past them down the center of the street, one of the Petitioners shouted, "Stop, Phoenix Police," or similar words, and Petitioners immediately unleashed a fusillade of bullets at Respondent's back. Petitioner Salgado fired six times, rapid-fire, striking Respondent in the back of the elbow and behind the knee. Petitioner Lopez fired twice. Respondent was struck a third time from behind in the kidney area, but the bullet passed through his body and was not recovered, so which officer fired it is unknown.

The only justification for the shooting ever expressed by Petitioners at any time, in any of their many inconsistent sworn and unsworn statements, was that Respondent had turned and raised his weapon as if to fire at them. Petitioners conceded that, with respect to the gunshots they had heard, they didn't know whether Respondent was a victim (which he was), a perpetrator or uninvolved; that, prior to Respondent's alleged assault on the Petitioners, he was not a suspect in any crime and they did not consider him a fleeing felon; that running down a street in Phoenix with an unconcealed pistol in hand is not a crime.

Seeking to avoid the factual dispute that would defeat their qualified immunity claim, Petitioners conceded for the purpose of their motion that Respondent had not turned and raised his gun toward them.[1] In so doing, they substitute a hypothetical rationale for their conduct in place of the asserted factual one they have testified to repeatedly.

Several factual assertions made by Petitioners merit clarification:

- At the time they shot Respondent in the back, Petitioners did not know that the gunfire they heard came from a drive-by shooting as opposed to being, for example, random or celebratory, or whether it was gang-related, or that it was directed at a party taking place in a parking lot outside the home of Respondent's mother.

---

[1] By conceding this point, Petitioners avoid the Court's examination of the internal contradictions of their own testimony and the physical evidence that is wholly inconsistent with Petitioners' version of the events.

- There is no evidence that the other two individuals whom Petitioners observed running were, or appeared to be, "companions" of Respondent.
- There is no evidence that Petitioners perceived Respondent to be "in apparent pursuit of another".
- Despite repeated references in the petition, there is no evidence that Respondent was "fleeing" before the verbal warning to stop.
- While Respondent heard the verbal warning to stop, the hail of police bullets immediately struck him, leaving him no time to react to the warning.
- Whether or not he intended to stop was unknown to Petitioners and, in any event, they did not wait to find out what Respondent's intentions were before shooting him down.
- There is no evidence on the record that Respondent posed even "a general threat to the community" much less a significant or specified threat to the officers or others.

REASONS FOR DENYING THE PETITION

Petitioners contend that their petition should be granted for the following reasons: (1) the application of the qualified immunity doctrine to deadly force actions "is wildly inconsistent within and without the Ninth Circuit" (Pet. at 9); (2) the Ninth Circuit, by deciding the *Garner* question against Petitioners in this case erroneously and automatically denied qualified immunity (Pet. at 7); (3) the Ninth Circuit relied on Petitioners' subjective beliefs for its qualified immunity analysis (Pet. at 8-9), rather than examining this case from the viewpoints of

reasonable officers on the scene (Pet. at 11). While Petitioners' "Question Presented" posits a violation of the second prong of the two-part test enunciated in *Saucier v. Katz*, 553 U.S. 194 (2001), namely, whether the law governing the officers' conduct was clearly established, their argument deals almost entirely with the first prong – whether the force used was excessive to begin with. The argument, which relies on Petitioners' version of facts which are in dispute, and on facts which were neither known nor apparent to Petitioners, is hopelessly muddled.

None of Petitioners' reasons justify the granting of this petition. First, the Ninth Circuit issued its unpublished memorandum after application of the two part *Saucier* test. Second, the Ninth Circuit's decision is not in conflict with this Court's precedent or the decisions of other circuits. Further review is unwarranted.

I. THE COURT CORRECTLY APPLIED THE *GRAHAM/GARNER* DEADLY FORCE TEST TO THE FACTS OF THIS CASE

In *Saucier*, this Court instructed lower courts deciding summary judgment motions based on qualified immunity to consider "this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" 533 U.S. at 201.

Under the Fourth Amendment, police may use only such force as is objectively reasonable in light of the facts or circumstances confronting them. *Graham v. Connor*, 490 U.S. 386, 397 (1989). An officer's use of deadly force is reasonable only if "the officer has probable cause to believe that the suspect poses a significant threat of death or

serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). The reasonableness of the force used to effect a particular seizure is determined by "careful[ly] balancing ... 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396, quoting *Garner*, 471 U.S. 1. The force applied must be balanced against the need for that force.

Petitioners rely on information that became known to them after the incident to provide probable cause for shooting Respondent in the back. It is well settled law that probable cause must exist "at the moment the arrest was made"; it cannot be established by evidence made known to the police after the arrest is made. *Wong Sun v. United States*, 371 U.S. 471, 482 (1963); *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964); *Allen v. City of Portland*, 73 F.3d 232, 236 (9th Cir. 1995).

In this case, Respondent was running down the street with a gun, away from an area where gunshots were heard. There is no evidence that Respondent was a fleeing felon, a suspect of anything or that any other person was in potential danger at that moment in time. Even if Petitioners perceived this as a potentially dangerous situation, they were not free to gun down the Respondent to end it. See *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001) ("A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. There must be other significant circumstances that warrant the use of such a degree of force at the time it is used.").

Petitioners concealed themselves from Respondent's view, one yelled, "Stop, Phoenix Police," and they immediately began shooting at Respondent. It is undisputed that the shooting was either simultaneous with the warning or came immediately thereafter, which essentially means there was no warning at all. As the facts play out, this was an ambush by two officers from concealed positions upon Respondent who was running down a street away from the officers' location when he was shot in the back.

It bears repeating that Petitioners did not shoot a suspected fleeing felon. They shot, they say, someone who was about to shoot them. Petitioners should not be able to avail themselves of a qualified immunity defense by cherry-picking the facts. If it were established that Respondent appeared to be trying to shoot them, they would clearly be entitled to qualified immunity even if he were not, in fact, trying to do that. But Petitioners cannot sterilize the facts and eliminate their stated reason for shooting, ignore the fact that no time at all elapsed between the command to stop and the gunshots and ignore the facts that they did not know whether he was victim or perpetrator and did not, in fact, believe that he was a suspect (i.e., fleeing felon).

Petitioners asserted in testimony that they only fired in self-defense when Respondent aimed his gun at them, a disputed fact. They adamantly maintained that they would not have fired otherwise, that they did not believe that he was a fleeing felon, that running with a gun is not a crime in Arizona. The first of these assertions is abandoned for purposes of the motion. The rest, claim Petitioners, are irrelevant. By layering fiction upon fiction we must eventually reach the anomalous conclusion that police may back-shoot anyone that some hypothetical

reasonable officer might have thought was a fleeing felon, though the officers involved in fact, did not.

Petitioners attempt to enlarge the proscription against inquiring into an officer's motives or intent to encompass as well what the officer knew or observed. The objective reasonableness test is designed to protect officers from liability for acting on the basis of reasonable mistakes of fact. The Ninth Circuit rightly looked to their own statements to determine what information the officers had and whether they acted upon such a mistake. The first prong of *Saucier* is met.

II. THE NINTH CIRCUIT CORRECTLY APPLIED THE SECOND PRONG OF *SAUCIER*

Just as the first prong of the *Saucier* test protects officers from liability for reasonable mistakes of fact, the second protects them from reasonable mistakes regarding the legality of their actions. "An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Saucier*, 533 U.S. at 205.

Therefore, the second question the court must ask is whether " 'the contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Saucier*, 533 U.S. at 202 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The clearly established "inquiry . . . must be undertaken in light of the specific context of the case, not as a broad general proposition . . . " *Id.*, at 201, and with regard to the

law at the time of the alleged violations. See *Anderson*, 483 U.S. at 639. "The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards." *Saucier*, 533 U.S. at 208.

At this point, the futility of indulging in Petitioners' factual "concession" that Respondent did not turn and aim at them becomes clear. Under the "true" facts that they themselves insist upon in testimony, Petitioners had no misunderstanding at all of their powers and responsibilities: had Respondent not tried to take aim at them, they say quite correctly, they had no right to fire, and would not have fired, at him; since he did, they further say, they had every right to shoot. This is, of course, a correct understanding of the law, not a mistaken understanding, and the second prong of the *Saucier* test becomes irrelevant. Yet the Court is asked to ignore both their correct understanding and their stated reason for shooting, in order to conjure up a hypothetical reasonable officer to ratify conduct that they steadfastly maintain did not occur.

The relevant dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Saucier,* 533 U.S. at 202. An officer's entitlement to qualified immunity depends not on his subjective beliefs but rather on "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the relevant conduct] to be lawful, in light of clearly established law and the information the . . . officers possessed." *Anderson*, 483 U.S. at 64; *Clem v. Corbeau*, 284 F.3d 543, 554 (4th Cir. 2002). The Court must consider the facts from the perspective of a reasonable officer *on the scene*, and avoid judging the

officer's conduct with the "20/20 vision of hindsight." *Graham* at 396, 397.

While it is true that the Court should not delve into an officer's motives or intentions this does not mean that the Court cannot consider or must disregard the officers' *perception of the circumstances at the scene*. The Ninth Circuit did nothing more nor less than this in looking again to Petitioners' own admissions to determine whether they had a reasonably mistaken belief as to the legality of shooting the Respondent in the back.

No reasonable officer could ever conclude that shooting an individual, suspected of nothing, in the back without warning under the circumstances here presented "was within the bounds of appropriate police responses." *Saucier*, 533 U.S. at 201. Qualified immunity was rightfully denied these Petitioners based on the facts presented and the application of the law.

CONCLUSION

The Ninth Circuit's Memorandum decision in this case fully comports with this Court's relevant decisions. Moreover, "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10 of the Supreme Court. The Petition should be denied.

Respectfully submitted,

JOE KEILP
JOE KEILP, P.C.
1440 East Washington #100
Phoenix, Arizona 85034
(602) 252-0100

Attorney for Respondent

Supreme Court, U.S.
FILED
SEP 20 2002
OFFICE OF THE CLERK

No. 01-1819

IN THE

Supreme Court of the United States

RICK SALGADO, *et al.*,
Petitioners,

v.

MIGUEL ROSALES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONERS

DANIEL P. STRUCK *
JONES, SKELTON & HOCHULI
2901 N. Central Avenue
Phoenix, Arizona 85012
(602) 263-1700

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONERS	1
I. THIS COURT'S REVIEW IS NECESSARY TO EXTEND THE QUALIFIED IMMUNITY ANALYSIS OF *KATZ V. SAUCIER* TO CASES INVOLVING DEADLY FORCE	3
II. REVIEW IS WARRANTED TO DISPEL THE NINTH CIRCUIT'S MISTAKEN VIEW THAT A POLICE OFFICER'S SUBJECTIVE BELIEFS CAN DEPRIVE HIM OF QUALIFIED IMMUNITY	4
III. REVIEW IS NEEDED TO ELIMINATE FROM NINTH CIRCUIT JURISPRUDENCE THE NOTION THAT REASONABLE DISAGREEMENTS AMONG POLICE PRECLUDE QUALIFIED IMMUNITY—SUCH DISAGREEMENTS *COMPEL THE GRANTING* OF QUALIFIED IMMUNITY	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES — Page

Anderson v. Creighton,, 483 U.S. 635 (1987) 6
Crawford-El v. Britton, 523 U.S. 574 (1998) 6
Graham v. Connor, 490 U.S. 386 (1989) 6
Hunter v., Bryant, 502 U.S. 224 (1991)..... 5, 7, 8
Malley v. Briggs, 475 U.S. 335 (1986) 7, 8
Saucier v. Katz, 533 U.S. 194 (2001) 3, 7, 8
Tennessee v. Garner, 471 U.S. 1, 11-12 (1985) 3, 4, 7
United States v. Robinson, 414 U.S. 218 (1973) ... 6
Whren v. United States, 517 U.S. 806 (1996)..... 6

IN THE

Supreme Court of the United States

No. 01-1819

RICK SALGADO, *et al.*,
Petitioners,

v.

MIGUEL ROSALES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

The brief in opposition filed by respondent Rosales is long on factual rhetoric but contains no effective response to petitioners' compelling showing that certiorari is warranted in this case. When police shoot an armed suspect running from the scene of a midnight gun battle, qualified immunity shields such officers from personal liability regardless of whether the suspect is classified as fleeing the scene, pursuing others, or aimlessly jogging past police. Before exploring the legal arguments advanced by respondent, his submission of facts is worth examining.

First, respondent's effort to cast the two officers as "ambushing" a helpless young man is misleading. Running or even jogging from a gun battle is suspicious behavior at best and incriminating at worst. Respondent claims there was "no evidence that [police] perceived Respondent to be 'in apparent pursuit of another,'" but Petitioners wonder how else they could plausibly characterize respondent's midnight flight from a shooting scene. Respondent's mere possession of a firearm in the moments after 5-6 gunshots are seen and heard by police make him suspect number one; his position ahead of two unarmed youths racing behind him logically makes them his "companions," for who but friends/ companions would tag along with such a man? And one can logically characterize respondent as "fleeing" without a direct admission by him as to his foot speed or intent.[1]

Second, respondent admits hearing the verbal warning to "Stop! Phoenix Police!" but claims he had no time to react before he was struck by bullets. Petitioners acknowledge that deference must be given to this testimony, but two points are important to consider: (1) it is undisputed that the two companions trailing respondent immediately "reacted" to the warning by diving to the ground while respondent did not; and (2) the law governing police shootings does not demand

---

[1]Ironically, we do have such an admission in this case by respondent, who testified at his deposition that he recognized the occupants of the white van involved in the drive-by shooting outside his mother's house as gang members, retrieved his gun despite the fact that possession of it would put him in violation of the conditions of his probation, and was intent on chasing and capturing the one van passenger (who had foolishly stepped out of the van and was left behind) because he was "very angry." He also confessed during his deposition that he had no plans to stop when commanded by police because he knew he would be arrested for carrying a firearm while on probation. This testimony was unknown to the two officers at they time they shot respondent, yet it highlights the ludicrous nature of respondent chastizing police for not producing "evidence" that they knew he was "fleeing" and in "apparent pursuit of another."

that warnings be given in all circumstances. *See Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (deadly force permissible where officer has probable cause to believe suspect poses a threat of serious harm to others and if, where feasible, some warning has been given).

Finally, respondent continues to advance the theory embraced by the lower courts—that there exists no evidence that respondent posed a general or specific threat to the community and, regardless, these two officers did not personally consider him to be fleeing and further opined that running through the streets of Phoenix, Arizona, with a visible gun is not a crime. As demonstrated below, gun-carrying by itself may not constitute a crime in Arizona (depending on the legal status of the person carrying the gun), but armed flight from a gun-battle most certainly does give police grounds to stop the suspect and protect the public from potential harm.

I. THIS COURT'S REVIEW IS NECESSARY TO EXTEND THE QUALIFIED IMMUNITY ANALYSIS OF *KATZ v. SAUCIER* TO CASES INVOLVING DEADLY FORCE.

Respondent's brief, after taking note of the three arguments cited by Petitioners to support review, completely ignores sections I and III of the Petition, choosing instead to frame the debate as whether *Garner* and *Saucier v. Katz*, 533 U.S. 194 (2001) were correctly applied (and thus trying to spin this into a factual contest). As a consequence, respondent apparently concedes the (fairly obvious) point that *Katz*'s qualified immunity analysis must be extended to deadly force cases under *Garner*, yet makes no effort to defend the Ninth Circuit's confused holding here that the "unreasonableness" of the officers' belief that the shooting was constitutionally justified similarly compelled the denial of qualified immunity. Losing the *Garner* deadly force question does not automatically spell defeat for an officer's qualified immunity

defense, yet that is essentially what the Ninth Circuit concluded. Review is needed to emphatically confirm that an officer's violation of *Garner*'s Fourth Amendment test does not preclude him from receiving qualified immunity.

II. REVIEW IS WARRANTED TO DISPEL THE NINTH CIRCUIT'S MISTAKEN VIEW THAT A POLICE OFFICER'S SUBJECTIVE BELIEFS CAN DEPRIVE HIM OF QUALIFIED IMMUNITY.

Without knowing it, this section of the Petition is the only one respondent's brief makes any serious attempt at addressing. After rehearsing general deadly force law under the Fourth Amendment, respondent complains of a lack of "evidence" that he could be viewed as a "fleeing felon, a suspect of anything or that any other person was in potential danger at that moment in time." (Brief in Opposition at 5) Citing to Ninth Circuit law, respondent further claims that even if he was perceived as potentially dangerous, police were not free to gun him down.

Summary judgment may require some deference to the non-movant's version of the facts, but it is no substitute for common sense and does not hamstring police into taking the most benign and imaginative views of the armed persons they encounter. For instance, respondent opens his brief by pointing out that these two officers "did not know that the gunfire they heard came from a drive-by shooting as opposed to being, for example, random or celebratory, or whether it was gang-related, or that it was directed at a party taking place in a parking lot outside the home of Respondent's mother." (Brief in Opposition at 2) This rumination, while amusing, makes Petitioners wonder if respondent has forgotten that this civil action is not about his own guilt or innocence but whether police "could reasonably believe" his conduct posed a serious threat to others justifying the use of

deadly force. Gunshots at midnight in a gang-infested neighborhood are more than enough to make police extremely nervous about their own safety and the safety of others; when spotting a person running from such a scene while carrying a gun with two companions behind him, police are certainly justified in suspecting (or can mistakenly assume) imminent danger if the flight is allowed to continue.

The more salient debate concerns the Ninth Circuit's treatment of the subjective beliefs of the officers in failing to consider respondent to be a fleeing felon. Respondent defends the Ninth Circuit's approach by contending that police "should not be able to avail themselves of a qualified immunity defense by cherry-picking the facts." (Brief in Opposition at 6). Petitioners vehemently disagree, as summary judgment standards under Rule 56 leave them with no choice but to "cherry-pick" the facts or, stated differently, to accept the non-movant's factual version, ignore their own "stated reason for shooting," and then seek qualified immunity on the basis that even the factual fantasy created by the non-movant involves constitutionally forgiveable conduct protected by qualified immunity. Had the secret service in *Hunter v. Bryant*, 502 U.S. 224 (1991) subjectively dismissed the threats in the letters addressed to then-President Reagan as non-credible but arrested the suspect anyway for different, malicious reasons, surely the courts would still be required to "cherry-pick" the facts and inquire into whether an objectively reasonable officer "could have believed" the arrest to be constitutional.

That Phoenix police testified to shooting in self-defense does not disqualify them from receiving qualified immunity at the summary judgment stage simply because respondent's testimony (that he never turned and aimed his gun at the officers) removed the factual underpinnings of self-defense. Instead, the doctrine of qualified immunity requires the actions of the officers to be viewed, by reviewing judges,

through the lens of hypothetical, objective officers who are free to examine alternative grounds for the use of deadly force. In both qualified immunity and Fourth Amendment cases, this Court has frequently stressed the irrelevance of the officer's subjective intent or motivation, yet both respondent and the Ninth Circuit succeeded in binding the officers with their subjective intent or motivation. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Whren v. United States*, 517 U.S. 806 (1996); and *Graham*, 490 U.S. at 397.

As stated in the Petition, if an objective risk of danger would be apparent to the reasonable officer examining the facts, it is quite irrelevant that the officer involved in the shooting subjectively discounts such a risk. *See United States v. Robinson*, 414 U.S. 218, 236 (1973) ([I]t is of no moment that [the officer] did not indicate any subjective fear of the [arrestee] or that he did not himself suspect that [the arrestee] was armed."). Whether one calls it "cherry-picking" the facts or simply examining the facts (the non-movant's credible version) from the viewpoint of an objective officer, review is warranted to extend the irrelevance of an officer's subjective intent or motivation to his assessment of the danger he faces.

III. REVIEW IS NEEDED TO ELIMINATE FROM NINTH CIRCUIT JURISPRUDENCE THE NOTION THAT REASONABLE DISAGREEMENTS AMONG POLICE PRECLUDE QUALIFIED IMMUNITY—SUCH DISAGREEMENTS *COMPEL THE GRANTING* OF QUALIFIED IMMUNITY.

While largely ignoring this third argument in support of review, respondent does conclude his brief by proclaiming that "[n]o reasonable officer could ever conclude that shooting an individual, suspected of nothing, in the back without warning under the circumstances here presented 'was

within the bounds of appropriate police responses.'" Brief in Opposition at 9, citing *Katz*, 533 U.S. at 201. Three dissenting Supreme Court justices reached this very conclusion in *Garner*, ruling that a Tennessee statute authorizing the use of deadly force against an *unarmed, non-dangerous* teenage boy (who was jumping a fence after a suspected home burglary) was constitutional. But that is not the point, because qualified immunity is the issue here and it is the perspective of police officers that must be considered.

Omitted from respondent's proclamation is any mention of the three most important, undisputed facts of this case: (1) the recent drive-by shooting that alerted police to a dangerous situation; (2) respondent's running from the shooting scene while carrying a gun; and (3) the immediate reaction of respondent's two companions in dropping to the ground when commanded by police. When viewed against these facts, it is clear that some reasonable officers might condemn the decision to shoot while other reasonable officers might countenance it as necessary to avoid serious harm to others if respondent were left free to continue his armed flight. The mere fact that reasonable officers "could disagree" about the constitutional legality of the shooting compels the granting of qualified immunity in favor of Petitioners. *See Katz*, 533 U.S. at 201 ("a reasonable officer in petitioner's position could have believed that hurrying respondent away from the scene...was within the bounds of appropriate police responses."); *Hunter* 502 U.S. at 228 (qualified immunity inquiry is whether "a reasonable officer could have believed that probable cause existed to arrest" the suspect, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact."); and *Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized.")

Unless *Katz*, *Hunter*, and *Malley* are no longer viable precedent or inapplicable in deadly force cases, review is necessary to reconcile Ninth Circuit law. Alternatively, this case should be remanded to the Ninth Circuit for reconsideration in light of such precedent.

CONCLUSION

For all the reasons set forth above in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL P. STRUCK *
JONES, SKELTON & HOCHULI
2901 N. Central Avenue
Phoenix, Arizona 85012
(602) 263-1700

* Counsel of Record

Attorneys for Petitioners